HON. THOMAS S. ZILLY
Noted: August 24, 2018[1]
WITHOUT ORAL ARGUMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BRENDA TAYLOR, individually, and as executor of the Estate of Che Andre Taylor; JOYCE TAYLOR, individually; CHE ANDRE TAYLOR, JR., individually; and SARAH SETTLES on behalf of her minor child, CMT,

Plaintiffs,

vs.

CITY OF SEATTLE; MICHAEL SPAULDING and "JANE DOE" SPAULDING, and their marital community composed thereof; SCOTT MILLER and "JANE DOE" MILLER, and their marital community composed thereof; TIMOTHY BARNES and "JANE DOE" BARNES, and their marital community composed thereof; and AUDI ACUESTA and "JANE DOE" ACUESTA, and their marital community composed thereof,

Defendants.

No. 2:18-CV-00262

DEFENDANTS' REPLY IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS UNDER 12(b)(6)

Note on Motion Calendar: August 24, 2018
WITHOUT ORAL ARGUMENT

Defendants City of Seattle, Michael Spaulding, Scott Miller, Timothy Barnes, and Audi

[1] This motion was re-noted via stipulation at Plaintiffs' request.

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Acuesta ("Defendants") Reply in support of their Partial Motion to Dismiss Plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(6). In support thereof, Defendants state the following:

I. Plaintiffs concede that there is no due process claim for excessive force and that Brenda Taylor's Substantive due process claim should be dismissed.

Plaintiffs concede that any use of force claim should be analyzed through the lens of the Fourth Amendment. (Dkt. 24, p. 10). Accordingly, Paragraph 4.25 should be dismissed from Plaintiff's Amended Complaint. Plaintiffs also concede that Brenda Taylor's due process claim should be dismissed. (*Id.*). Accordingly, this Court should dismiss Paragraph 5.7 of Plaintiffs' Amended Complaint.

II. Plaintiffs concede that Joyce Dorsey cannot recover for any Washington state law claims.

Plaintiffs did not respond to the Defendants' argument that Joyce Dorsey cannot recover for any Washington state claims under the Washington Survival Statutes. (Dkt. 21, pp. 10-11). As such, Plaintiffs conceded that Joyce Dorsey does not have any Washington state law causes of action.

III. Plaintiffs do not establish a *Monell* claim.

Plaintiffs concede that they improperly rely on respondeat superior liability for their Section 1983 claims. (Dkt. 24, p.5, lines 7-9). This is contrary to the law. *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012) (citing *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir.2007) and *Monell v. Dept. of Social Svcs. of N.Y.*, 436 U.S. at 658, 691 (1978). Plaintiffs then attempt to create a *Monell* claim for the first time in their Response brief. (Dkt. 24 at p. 5). Even incorporating any improper new pleadings raised in their Response brief, Plaintiffs fail to establish a *Monell* claim. Plaintiffs claim that this sole alleged incident gives rise to a "custom" of "giving conflicting commands." (*Id.*). Plaintiffs never identify what this custom is; how it came to be; why it is deficient; or how it was the moving force behind the alleged constitutional violation(s).

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> Indeed, the Ninth Circuit has made clear that claims of *Monell* liability must comply with the basic principles set forth in *Twombly* and *Iqbal*: (1) the complaint may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying fact to give fair notice and to enable the opposing party to defend itself effectively; and (2) the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. Thus, Plaintiff must, for example, identify the policies or customs at issue, and explain why they were deficient.

Turano v. Cty. of Alameda, No. 17-CV-06953-KAW, 2018 WL 3054853, at *10 (N.D. Cal. June 20, 2018) (internal citations and quotations omitted). Plaintiff does not reach the minimum pleading standards required for a properly pled *Monell* claim, which would put the City on notice. This Court should dismiss any alleged *Monell* claim and dismiss Paragraph 2.5 of Plaintiffs' Amended Complaint.

IV. Plaintiffs' Response fails to argue that Plaintiffs cannot meet the "public accommodation" element of a claim under RCW 49.60.030 *et seq.*

Plaintiffs blatantly ignore the simple statutory argument raised by Defendants. Defendants argued that Plaintiffs are unable to meet all of the elements required by 49.60.030 *et seq.* because the alleged actions did not occur in a "place of public accommodation or assemblage." (Dkt. 21, pp. 8-9). *See Fell v. Spokane Transit Authority*, 128 Wash.2d 618; 911 P.2d 1319 (Wash. 1996). Plaintiff relies on *McKinney v. City of Tukwila*, 103 Wash. App. 391 (2000) to argue that a WLAD claim be defeated because of an evidentiary deficiency. (Dkt. 24, p. 6). This case is inapposite. *McKinney* dealt with alleged violations of the statute in a public park. A park is contemplated by the statute as a place of public accommodation or assemblage. *Fell*, 128 Wash. 2d at 638. Plaintiff fails to provide any evidence that a sidewalk, planting strip, or roadway is considered a place of public accommodation or assemblage. *See White v. City of Tacoma*, No. C12-5987 RBL, 2014 WL

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172037, at *12 (W.D. Wash. Jan. 15, 2014) (granting summary judgment on WLAD claim where court found that an "apartment building, and the sidewalk in front of [a] building, cannot be considered a place of public accommodation."). This Court should dismiss Plaintiffs' Sixth Cause of Action.

V. Plaintiffs fail to establish any claim of negligence where they affirmatively state that they are seeking recovery for intentional acts and do not identify any alleged negligent acts.

Plaintiffs' arguments on their negligence claims do not defeat Defendants' 12(b)(6). Plaintiffs argue that "Plaintiffs' Amended Complaint *is premised on intentional acts of Officers Spaulding and Miller*, which could be deemed negligent and the negligence of Officers Acuesta and Barnes." (Dkt. 24, p. 3, lines 20-21) (emphasis added). First, Plaintiffs ignore Defendants' cited authority that they cannot premise a claim of negligence on intentional acts. (*See* Dkt. 21, p. 5). Plaintiffs' admission that their Amended Complaint is premised on Officers Spaulding and Miller's intentional acts defeats any potential claim of negligence against those officers. Second, Plaintiffs fail to allege any facts to put Defendants on notice of any negligence claim against Officers Acuesta and Barnes. Plaintiffs' claims against Acuesta and Barnes are simple – they had a video and they allegedly yelled inconsistent commands. (Dkt. 6, ¶¶ 4.9 – 4.13). Plaintiffs fail to allege any facts to put Defendants on notice of the scope of what Plaintiffs' alleged negligence claim is, how the Defendants' alleged actions give rise to a duty *to* Taylor and how any alleged breach proximately caused Taylor's death by Officer Spaulding and Miller's shooting. (*See* Dkt. 6, ¶ 4.17). Third, Plaintiffs' reliance on *O'Donohue v. Riggs*, 73 Wash.2d 814, 819, 440 P.2d 823 (Wash. 1968) is misplaced. (*See* Dkt. 24, p. 4). *O'Donohue* discusses *unintentional* application of force. Officers Spaulding and Miller's use of force was intentional. Plaintiffs admit this point. (*See* Dkt. 24, p. 3). There is no allegation that Officers Barnes or Acuesta used force on Taylor.

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O'Donohue is inapplicable to the case at hand. Finally, Plaintiffs fail to respond to Defendants' public duty doctrine arguments, arguing that there has been no answer or discovery. (Dkt. 24, p. 4). The public duty doctrine analysis still applies where Plaintiffs' negligence claims are still premised on the intentional acts of Officers Spaulding and Miller. Plaintiffs' negligence claims should be dismissed.[2]

VI. Plaintiffs fail to establish how Officers Acuesta and Barnes are liable.

Plaintiffs' response fails to identify how Officers Acuesta and Barnes are Defendants in this action – as opposed to being identified as witnesses for discovery and trial. Plaintiffs copy and paste their Amended Complaint allegations, already discussed and identified in Defendants' 12(b)(6). (*See* Dkt. 24, 7-8). Plaintiffs then conclude by arguing, "[s]everal of the Plaintiffs' causes of action can extend to alleged actions of Officers Acuesta and Barnes." (Dkt. 24, p. 8, lines 4-5).[3] This is insufficient to put Officers Acuesta and Barnes of what, if any, claims ae alleged against *them*.

The *only* allegations in Plaintiffs' Amended Complaint where Officers Acuesta and Barnes are specifically identified is that their car recorded the video that captured pieces of the underlying event. (Dkt. 6, ¶ 4.10). Otherwise, Officers Acuesta and Barnes are not identified. (*See* Dkt. 6). In their Response (though not specifically pleaded in their Amended Complaint) Plaintiffs claim that Officers Acuesta and Barnes were involved in the "multiple police officers" yelling "inconsistent commands." (*See* Dkt. 24, pp. 3-4, 7; Dkt. 6, ¶ 4.13). Defendants already addressed these

[2] To the extent any negligence claim(s) survive this motion, only the Estate has standing to bring a negligence claim. *See* RCW 4.20.046.

[3] Defendants should not be forced to guess what claims target which Defendants. *Heineke v. Santa Clara Univ.*, No. 17-CV-05285-LHK, 2018 WL 3368455, at *21 (N.D. Cal. July 10, 2018) (citing *Bautista v. Los Angeles Cty.*, 216 F.3d 837, 840 (9th Cir. 2000); *Arres v. City of Fresno*, No. CV F 10-1628 LJO SMS, 2011 WL 284971, at *30 (E.D. Cal. Jan. 26, 2011).

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allegations in the context of Plaintiffs' attempted negligence claim in Section VI, *supra*, warranting dismissal of Paragraph 5.1 and 5.5 against Officers Acuesta and Barnes.

There is no dispute that Officers Acuesta and Barnes did not seize, arrest, or use force on Taylor. (*See* Dkt. 6, ¶¶ 4.11, 4.17; Dkt. 24, p. 3, lines 20-21). Additionally, the act of yelling commands, inconsistent or otherwise, does not give rise to any claim of seizure, arrest, or force. *See California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 1551(1991); *Nelson v. City of Davis*, 685 F.3d 867, 876 (9th Cir. 2012). This warrants dismissal of Paragraphs 5.3, 5.4, and 5.11 of Plaintiffs' Amended Complaint against Officers Acuesta and Barnes. The various Fourteenth Amendment due process claims are tied to the use of force and subsequent death of Taylor. It is undisputed that Officers Acuesta and Barnes did not shoot Taylor. (Dkt. 6, ¶ 4.17). Accordingly, they did not allegedly deprive Plaintiffs' of any familial relationship under the Fourteenth Amendment. This warrants dismissal of Paragraphs 5.7-5.11. Finally, "Plaintiffs are willing to stipulate that" the claims of outrage and assault "are tied to the excessive use of force claims." (Dkt. 24, p. 10, lines 12-13). Again, as Officers Acuesta and Barnes did not use force on Taylor, these claims cannot stand against them. (*See id.;* Dkt. 6, ¶ 4.17). There are no other claims standing. Plaintiffs' Amended Complaint does not sufficiently plead *any* claims against Officers Acuesta and Barnes. Officers Acuesta and Barnes should be dismissed.

VII. Plaintiffs fail to distinguish between a false arrest and unlawful seizure claim.

Plaintiffs now claim that they have three claims of false arrest and unlawful seizure: a common state law claim of false arrest; a § 1983 claim of false arrest and a § 1983 claim of unlawful seizure. (Dkt. 24, p. 8). Plaintiffs fail to articulate separate and distinct § 1983 claims of unlawful seizure and false arrest. Plaintiffs argue that Taylor was seized when shot and arrested when he was rolled over and handcuffed. (*Id.*). These claims are one in the same. The Supreme Court notes that

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an arrest is the "quintessential seizure of the person under our Fourth Amendment jurisprudence," which occurs with "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee." *Hodari D.*, 499 U.S. at 624-26, 111 S. Ct. at 1551. As such, the shooting of Taylor could arguably constitute an arrest or seizure – thus being one in the same under the law. Plaintiffs do not articulate separate and distinct claims. Additionally, as discussed in Section IX *infra*, only the Estate may bring an unlawful seizure/false arrest claim. This Court should dismiss duplicative claims and other Plaintiffs from this claim.

VIII. Plaintiffs fail to rebut Defendants' argument that only the Estate has standing to bring claims of outrage and assault.

Defendants moved to dismiss any Plaintiff other than the Estate bringing claims of outrage and assault. (Dkt. 21, pp. 13-14). Plaintiffs do not rebut this. Instead, Plaintiffs argue incorrectly that an excessive force § 1983 claim "fits and meets all the requirements set forth in the torts of outrage and assault." (Dkt. 24, p. 10). Next, Plaintiffs stipulate that any such claims of outrage or assault "are *tied* to the excessive use of force claim." (*Id.*). As such, Plaintiffs appear to agree that only the Estate has standing to bring any claim for outrage or assault. This Court should dismiss these claims by all of the Plaintiffs except the Estate.

IX. Plaintiffs improperly rely on *Davis* for Fourth Amendment standing, which is correctly granted under the survival statutes.

Plaintiffs misapply dated due process analysis to establish Fourth Amendment standing. Plaintiffs rely on *Davis v. City of Ellensburg*, 651 F.Supp. 1248 (E. D. Wash. 1987) claiming that all the Plaintiffs have standing to bring Fourth Amendment claims. (Dkt. 24, p. 10). They do not and Plaintiffs' reliance on *Davis* is improper. The *Davis* Court held, "courts have 'borrowed' the wrongful death remedy as well as the survival remedy from state statutes under the vehicle of 42 U.S.C. §1988." *Davis v*, 651 F.Supp. at 1253 (citing, among others, *Brazier v. Cherry*, 293 F.2d 401

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(5th Cir. 1961), *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *Guyton v. Phillipps*, 532 F.Supp. 1154 (N.D. Cal. 1981)). This reliance is misplaced.

Fourth Amendment rights belong to the decedent, not to family members. *Alderman v. United States*, 394 U.S. 165, 174 (1969). Washington statutes supply law designed to permit personal representatives of a decedent's estate to assert his claims: the general and special survival statutes. R.C.W.A. 4.20.046 (West, 2018), R.C.W.A. 4.20.060 (West, 2018). "The survival statutes preserve the decedent's own cause of action for personal injury and death, permitting the action to be brought on behalf of the statutory beneficiaries and/or the decedent's estate." Steve Andrews, Comment, *Survivability of Noneconomic Damages for Tortious Death in Washington*, 21 SEATTLE U. L. REV. 625 (1998). By contrast, Washington's wrongful death statutes "create a new cause of action for the named beneficiaries." *Id* at 628. As a result, the Ninth Circuit holds that the survivors of an individual may assert that individual's § 1983 claims "if the relevant state law authorizes a survival action." *Moreland v. Las Vegas Met. Police Dept.*, 159 F.3d 365, 369 (9th Cir. 1998).[4] The decedent, not his family, must assert a Fourth Amendment claim because family members "were not directly subjected to the excessive use of state force and therefore cannot maintain personal causes of action under section 1983 in reliance on this Fourth Amendment theory." *Smith v. City of Fontana*, 818 F.2d 1411, 1417 (1987) (overruled on other grounds by *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir.1999). Insofar as *Davis*'s application of the wrongful death statutes conflicts with this holding, it is superseded, and Washington district courts apply the survival statutes rather than the wrongful death statutes in cases postdating *Moreland*. *See Ostling v. City of Bainbridge Island*, 872

[4] The Nevada statute at issue in *Moreland* permits a survival action only by a personal representative. Id at 369 n.2. Similarly, in Washington, "the claim must be brought by the executor or the administrator" of decedent's estate, though for the special survival statute, R.C.W.A. 4.20.060 (West, 2018), it is brought on behalf of named beneficiaries. Anderson, supra at 634.

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F.Supp.2d 1117, 1124-25 (W.D. Wash. 2012), *Lookabill v. City of Vancouver*, No. 13–5461 RJB, 2013 WL 5770381 at *4 (W.D. Wash. Oct. 24, 2013).

Nothing in the current version of the survival statutes is inconsistent with the purposes of §1983, as plaintiffs allege. In *Davis*, the court was concerned that the *1987 version* of the General Survival Statute (R.C.W.A. 4.20.046 (West, 2018)) included a "statutory preclusion of damages for pain and suffering and emotional distress." *Davis*, 651 F.Supp at 1253. This provision led to the conclusion that it was "presented with standing problems" that were inconsistent with the goals of § 1983. *Id* at 1253-55. Importantly for the case at bar, the statute was modified after *Davis* was decided to remove any such interpretation. Laws of 1993, ch. 44, Sec. 1. The current version permits recovery "on behalf of those beneficiaries enumerated in RCW 4.20.020." R.C.W.A. 4.20.046 (West, 2018). The concerns animating the court in *Davis*, and the holding flowing therefrom, are abrogated. In this case, there are claims for personal injuries resulting in death, thus the Special Survival Statute controls – and Brenda Taylor, as the personal representative, is the *only* Plaintiff who may bring a Fourth Amendment claim. This claim should be dismissed as to all other Plaintiffs.

X. Defendants moved to dismiss Paragraphs 5.7, 5.9, 5.10 of Plaintiffs' Amended Complaint, and *not* Joyce Dorsey's due process claims alleged in Paragraph 5.8.

Plaintiffs commit two pages of their brief arguing that Joyce Dorsey has a valid due process claim. (Dkt. 24, pp. 8-9). Defendants never sought dismissal of Joyce Dorsey's due process claim (Paragraph 5.9). Instead, Defendants challenge Paragraph 5.7 of Plaintiffs' Amended Complaint arguing that Brenda Taylor is barred from bringing a due process claim. (Dkt. 21, p. 15). Plaintiff concedes this point. (Dkt. 24, p. 10). Defendants also argue that a party cannot sue on behalf of any other persons for a Fourteenth Amendment due process claim. (Dkt. 21, pp. 15-16). This justifies dismissal of Paragraph 5.9 where the Estate seeks to bring a due process claim on behalf of all of

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Taylor's "children" and Paragraph 5.10 where the Estate seeks to bring a due process claim on behalf of the entire family. Plaintiffs do not dispute this point other than simply stating in conclusory fashion, "[t]he Estate also has standing to bring its own claim under § 1983." (Dkt. 24, p. 10, lines 3-4).[5] This Court should dismiss Paragraphs 5.7, 5.9, and 5.10 of Plaintiffs' First Amended Complaint.

CONCLUSION

Plaintiffs' Response fails to defeat Defendants' 12(b)(6) Motion. Instead, Plaintiffs' Response supports Defendants' 12(b)(6) arguments justifying dismissal.

DATED this 24th day of August, 2018.

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[5] Plaintiff again conflates standing to bring Fourth Amendment claims and Fourteenth Amendment claims. They are distinct.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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